UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	CHAPTER 13
MARGARET BARBER,	:	
	:	Bankruptcy No. 00-10027 KJC
Debtor	:	
MARGARET BARBER,	:	
Plaintiff	:	
v.	:	
FAIRBANKS CAPITAL CORP.	:	
ALPHA ONE MORTGAGE CORP.	:	
JAMES SIESSER and	:	
ADVANTA MORTGAGE CORP.	:	
Defendants	:	ADVERSARY NO. 00-696

M E M O R A N D U M[1]

BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE

BACKGROUND

On October 11, 2000, plaintiff-debtor Margaret Barber (the "Debtor") filed an adversary proceeding against Fairbanks Capital Corporation ("Fairbanks"), Alpha One Mortgage Corporation ("Alpha One"), James Siesser ("Siesser"), and Advanta Mortgage Corporation ("Advanta"), seeking relief with respect to two allegedly fraudulent home equity loans. By

[1]The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A),(B),(K) and (O) .

Memorandum Opinion dated August 24, 2001, the motion by Fairbanks for judgment on the pleadings was granted in part, and Counts IV and VI of the Debtor's complaint were dismissed as to Fairbanks. *Barber v. Fairbanks Capital Corp. (In re Barber),* 266 B.R. 309 (Bankr.E.D.Pa. 2001).

Currently before the Court are two separate motions for summary judgment, one filed by Advanta on June 6, 2002, and one filed by Fairbanks on June 7, 2002. On June 27, 2002, the Debtor filed a response to each motion for summary judgment, in which the Debtor included a cross-motion for summary judgment against both Advanta and Fairbanks on Count I (respectively, the "Debtor's Response to Advanta" and the "Debtor's Response to Fairbanks"). On July 19, 2002, Advanta filed a reply to the Debtor's Response to Advanta and, on July 22, 2002, Fairbanks filed a reply to the Debtor's Response to Fairbanks. On August 1, 2002, this Court heard oral argument on the summary judgment motions, and the responses thereto.

The Debtor's six count complaint may be summarized as follows:

- Count I asserts claims against Fairbanks and Advanta under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.,* ("TILA") and the Home Ownership and Equity Protection Act of 1994 , 15 U.S.C. § 1639(a) ("HOEPA");
- Count II asserts claims against Fairbanks and Advanta under the Pennsylvania Home Improvement Finance Act, 73 P.S. § 500-101 *et seq.* ("HIFA") and Pennsylvania's usury statute, 41 P.S. §§ 502 and 503 ;
- Count III asserts claims against all of the defendants under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 *et seq.* ("UDAP");

- Count IV asserts claims against Fairbanks and Advanta under the Equal Credit Opportunity Act, 15 U.S.C. § 1691(d)(1) ("ECOA"); however, pursuant to the August 24, 2001 Memorandum Opinion, this Count was dismissed against Fairbanks;
- Count V asserts claims against Alpha One and Siesser for breach of fiduciary duty; and
- Count VI asserts claims against Fairbanks, Alpha One and Siesser under a common law fraud theory; however, pursuant to the August 24, 2001 Memorandum Opinion, this Count was dismissed against Fairbanks.

Advanta seeks summary judgment in its favor with respect to Counts I, II, III, and IV. Fairbanks seeks summary judgment in its favor with respect to Counts I and II and requests entry of a default judgment against the Debtor on its counterclaims. The Debtor's cross-motion for summary judgment seeks summary judgment in her favor and against defendants Advanta and Fairbanks on Count I.

For the reasons set forth in this Memorandum, I will grant Advanta's summary judgment motion with respect to Count IV (ECOA), but deny summary judgment on Counts I (TILA and HOEPA), II (HIFA) and III (UDAP). I will deny Fairbanks' summary judgment motion with respect to Count I (TILA and HOEPA), and the Debtor's claims under HIFA in Count II, but grant summary judgment with respect to the Debtor's usury claims in Count II. I will also deny Fairbanks' request for default judgment on its counterclaims against the Debtor. Finally, I will also deny the Debtor's cross-motion for summary judgment on Count I against Advanta and Fairbanks.

LEGAL STANDARD

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056. In a motion for summary judgment, the moving party "always bears the initial responsibility of informing the...court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Once the moving party has made a proper motion for summary judgment, the burden shifts to the non-moving party, pursuant to Rule 56(e), which states, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The party opposing the motion "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586.

Before a court will find that a dispute about a material fact is genuine, there must be sufficient evidence upon which a reasonable jury could return a verdict for the non-moving

party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court must view the facts and draw inferences in a light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513-14. "[W]here the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Pastore v. Bell Tel. Co.*, 24 F.3d 508, 512 (3d Cir. 1994). It is not the role of the judge to weigh the evidence or to evaluate its credibility, but to determine "whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

FACTUAL ALLEGATIONS.[2]

The Debtor is an 86-year-old widow who owns her home at 5336 Catherine Street. In early 1998, the Debtor was solicited for home improvements by a home improvement contractor who offered to locate financing for the improvements. The contractor referred the Debtor to James Siesser, of Alpha One Mortgage Corporation. Siesser contacted Advanta's predecessor in interest, Coastal Federal Mortgage Company ("Coastal"), with whom he had an ongoing relationship as an originator and broker.

Siesser and Alpha One did not request, nor was Coastal willing to approve, a home improvement loan requested by the Debtor. Instead, they unilaterally prepared a home equity consolidation loan transaction for the Debtor, one that would pay off the existing mortgage, and pay a water bill and various unsecured debts, in addition to providing funds for the home improvements. By requiring the Debtor to consolidate her debts and representing that such consolidation would be beneficial, Coastal, Alpha One, and Siesser were able to charge and

[2]The facts contained herein are summarized from the background "Factual Allegations" set forth in paragraphs 9 through 31 of the complaint.

collect higher fees for themselves.

On or about July 15, 1998, a loan closing was held at the Debtor's home. The Debtor executed a Note and Mortgage in favor of Coastal that obligated her for a $25,000.00 home equity loan with balloon payment and a 13.550% interest rate. Siesser and Alpha One received $3,750.00 in broker fees from Coastal for the transaction. Of the $25,000.00 loan amount, only $9,000 went to the home improvement contractor.

Because the $9,000.00 earmarked for home improvements was less than requested, some improvements were not done, and others were done poorly. The Debtor complained to Siesser about the quality of work, and Siesser used the opportunity to convince or mislead the Debtor into getting additional home improvement financing. Instead of seeking home improvement financing, Siesser again steered the Debtor to a "subprime" home equity lender – Sterling National Mortgage Company ("Sterling"). Sterling, Fairbanks' predecessor in interest, was another company for whom Siesser frequently originated loans, and with whom he had a close working relationship.

On or about January 7, 1999, less than six months after the Advanta loan, another loan closing was held at the Debtor's home. This time, the Debtor executed a Note and Mortgage in favor of Sterling that obligated her for a $33,600.00 home equity loan with a prepayment penalty. This loan, which allocated $4,206.83 in home improvement money, required included another $3,097.00 in fees to Seisser.

At all relevant times, Siesser and Alpha One acted as an agent for Advanta's and Fairbanks' predecessors in interest. Alpha One and Siesser were paid a fee pursuant to an understanding between them and Coastal and Sterling, and the defendants were parties to an

agreement or conspiracy to omit material facts in their dealings with the Debtor, including, but not limited to:

- failing to clearly explain the defendants' motives in requiring the Debtor to borrow more than she needed or requested;
- failing to clearly explain the advantages and disadvantages of a consolidation loan instead of simple home improvement financing or second mortgage loan; and
- failing to clearly explain the role of the broker and the amount and basis of his compensation prior to his becoming involved and performing "services."

DISCUSSION

I. Advanta's Motion For Summary Judgment.

On May 23, 2002, counsel for Advanta and Fairbanks deposed the Debtor. A copy of the deposition transcript is attached to Advanta's summary judgment motion. At the deposition, the Debtor testified that she did not recall entering into any loan agreements. Also at the deposition, the Debtor was shown copies of loan documents related to the two loans at issue and the Debtor denied signing the documents.

Count I - Alleged TILA and HOEPA violations.

Advanta argues that it is entitled to summary judgment on Count I of the complaint because the Debtor's deposition testimony shows that she cannot prove her factual allegations related to the loans and/or the circumstances surrounding the loan closing that allegedly took place on or about July 15, 1998 (the "Coastal/Advanta Loan"). Advanta suggests that there is no evidence to prove the existence of a mortgage against the Debtor's home, which is an essential

element to prove a claim under HOEPA.[3] The Debtor's Response to Advanta, however, attached copies of various loan documents related to the Coastal/Advanta Loan, along with an affidavit of the Debtor's counsel. The Debtor argues that the TILA and HOEPA violations are apparent from the face of the submitted documents.

In its reply, Advanta objected to the documents submitted with the Debtor's Response to Advanta on the grounds that the documents have not been authenticated and cannot be authenticated by Debtor's counsel's affidavit. A leading treatise discusses this issue as follows:

> Materials supporting or opposing a summary judgment motion generally may be submitted to the court in one of three ways:
>
> (1) If materials are already part of the record, the court considers them on summary judgment once counsel draws the court's attention to that part of the record. These materials need not be re-introduced by affixing them to an affidavit.
>
> (2) If materials such as discovery responses are prepared for the case but not yet placed in the record, counsel can submit them with the summary judgment motion. Theoretically, a covering affidavit should not be necessary here, because these discovery documents, signed by opposing counsel or the opposing party, are in essence self-authenticating. However, some courts may erroneously refuse submission of such materials absent a covering affidavit, and therefore it is advisable that counsel use a covering affidavit to ensure that the court considers the discovery material properly before it.
>
> (3) Finally, there are extra-record documents that are not part of the case (e.g., a land deed not produced in discovery). Unless this type of extra-record document is self-authenticating and intrinsically trustworthy on its face (a rare situation), this type of document must be introduced by affidavit to ensure its consideration by the court.
>
> ....
>
> Unauthenticated documents, once challenged, cannot be considered by a court in determining a summary judgment motion. In order for documents not yet part of the court record to be considered by a court in support of or in opposition to a summary judgment motion they must meet a two-prong test: (1) the document must be attached to

[3] *See* Advanta's Reply Memorandum filed July 19, 2002, p. 6.

> and authenticated by an affidavit which conforms to Rule 56(e); and (2) the affiant must be a competent witness through whom the document can be received into evidence at trial....Documentary evidence for which a proper foundation has not been laid cannot support a summary judgment motion, even if the document in question are highly probative of a central and essential issue in the case.

11-56 James Wm. Moore et al., *Moore's Federal Practice - Civil*, §56.10[4][c][i] and §56.14[2][c]. Because Advanta has challenged the documents submitted with the Debtor's Response, I must determine whether I can consider them in connection with deciding Advanta's summary judgment motion and the Debtor's Response to Advanta.

The affidavit of an attorney who lacks personal knowledge of the events in issue may not meet the requirements of Fed.R.Civ.P. 56(e), made applicable here by Fed.R.Bankr.P. 7056(e). *See Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662 (7th Cir. 1994)(holding that an affidavit by a lawyer who did not have personal knowledge of the events in issue, but was merely a "cover page for a sheaf of documents six inches thick" did not constitute admissible evidence to oppose the summary judgment motion). The Debtor's attorney does not have personal knowledge of the events leading up to or taking place during the Coastal/Advanta Loan closing. However, with a few exceptions, the affidavit submitted in connection with the Debtor's Response to Advanta does not attempt to place facts into evidence or to authenticate "extra-record" documents, but to draw the court's attention to documents that are already part of the record, have been proffered in response to discovery requests, or have been delivered to the Debtor from Advanta's counsel.[4] Accordingly, I may consider the following documents offered in connection with the motions for summary judgment:

[4]The only "extra-record" documents which were not adequately authenticated and cannot be considered are documents 9 and 10, which Debtor's counsel averred were received from the Debtor, but were not authenticated by her.

(1) Documents 1, 2, 3, 4, 5, 12, 14, 16, and 17 - - these documents were provided to the Debtor's counsel from Nicole Nigrelli, Esquire, former counsel for Alpha One and Siesser, in response to the Debtor's discovery requests made on December 26, 2001;[5]

(2) Documents 6, 7, 8, 13, and 19 - - these documents were provided to the Debtor's counsel from counsel for Advanta and, therefore, are admissible as admissions of a party opponent under Fed.R.Evd. 801(d)(2).[6]

(3) Documents 15 and 23 - - these documents are part of the record since they are pleadings (#23) or were attached to a pleading (#15 was attached to the answer filed by Alpha One).

(4) Documents 11, 18, 20 and 21 - - the Debtor's counsel can authenticate these documents because he has personal knowledge of documents 18 and 21, which are letters written by him; he stated in his affidavit that he personally obtained copies of documents 11 and 20 from the office of the Recorder of Deeds, Philadelphia County, thereby making those documents admissible under Fed.R.Evd. 901(b)(7).

(5) Document 24 - - This Court may take judicial notice of the Manual of the Title Insurance Rating Bureau of Pennsylvania (the "Insurance Manual") because

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[5]Once a "document has been authenticated by a party, the requirement of authenticity is satisfied as to that document with regard to all parties, subject to the right of any party to present evidence to the ultimate fact-finder disputing its authenticity." *Orr v. Bankr of America,* 285 F.3d 764, 776 (9th Cir. 2002).

[6]An attorney may be an agent of a client for purposes of Fed.R.Evd. 801(d)(2)(D). *Heyman v. Beatrice Co.,* 1995 WL 579475, *3 (N.D.Ill. Sept. 28, 1995) *citing United States v. Brandan,* 50 F.3d 464, 468 (7th Cir. 1995).

> "Federal Rule of Evidence 201 authorizes a court to take judicial notice of an adjudicative fact 'not subject to reasonable dispute'...[and] so long as it is not unfair to a party to do so and does not undermine the trial court's fact finding authority." *In re Indian Palms Assoc.*, 61 F.3d 197, 205 (3d Cir. 1995). It is not unfair to the parties for this Court to take judicial notice of the Insurance Manual since it is well-used and readily available, and also not excludable hearsay under Fed.R.Evd. 803(17), because it is a commercial publication that is generally used and relied upon by persons in the Pennsylvania title insurance industry. The Insurance Manual's provisions are binding upon all members and subscribers of the Title Insurance Rating Bureau of Pennsylvania ("TIRBOP"). TIRBOP is licensed by the Pennsylvania Insurance Department under 40 P.S. §910-41

The Debtor was 86 years old when the time the complaint was filed on October 11, 2000. Her deposition testimony shows that her recollection of the events surrounding the loan closing is possibly confused or it may underscore her allegations about the fraudulent conduct of the contractor and loan broker in connection with the two loan transactions. However, the loan documentation speaks for itself and raises issues of material fact regarding whether the Coastal/Advanta Loan violated TILA and HOEPA.[7]

[7]Although the Debtor's allegations address the conduct of Coastal, she sued Advanta as the assignee of the mortgage. (Ex. 11 to the Debtor's Response). The Debtor asserts that the Coastal/Advanta Loan is subject to HOEPA pursuant to 15 U.S.C. §1602(aa)(1), and that the TILA and HOEPA violations are apparent on the face of the loan documents. An assignee of a HOEPA mortgage is liable for claims that can be asserted against the original creditor of the mortgage. 15 U.S.C. § 1641(d). Furthermore, even assuming that the loan is not subject to HOEPA, an assignee is liable for TILA violations that are "apparent on the face of the disclosure statement," which includes violations that are determined to be "incomplete or inaccurate from the face of the disclosure statement or other documents assigned." 15 U.S.C. §1641(a).

The Debtor argues that the loan documentation is sufficient to defeat Advanta's summary judgment motion and to win her cross-motion for summary judgment on Count I. First, the Debtor argues that the TILA disclosure statement (Ex. DR-8)[8] is defective for failing to disclose unreasonable fees related to title insurance as finance charges. More specifically, Debtor contends that $570 charged by National Title Agency and $395 charged by Paul J. Gelman, Esquire, are unreasonable and should have been included in the amount of the finance charge disclosed on the Truth-in-Lending Disclosure Statement pursuant to 12 C.F.R. §226.4(c)(7)(i). (Ex. D.R.-7 and Ex. D.R.-8). The Debtor argues that the fees are unreasonable based upon the Insurance Manual, which provides in §5.17 that the cost for a mortgage title insurance policy in the amount of $0 to $30,000 is limited to $390. While it appears that the total costs related to title insurance may not comply with the Insurance Manual, there are issues of fact to be resolved before it can be determined whether the costs are unreasonable. For example, if Paul Gelman, Esquire performed his services for the title insurance company as an "Approved Attorney," as defined in §1.4, then §5.0 of the Insurance Manual requires that the title insurance fee should be limited to $125.00 as determined upon reference to §5.18. In such case, §5.0 also provides that the "charge for the search, examination of title and the settlement by the Approved Attorney is not governed by this Manual." Further, §2.1 lists tasks that are not included in the fees established by the Insurance Manual. Before the Court can determine whether the title insurance fees are unreasonable and should have been disclosed as finance charges under 12 C.F.R. §226.4(c)(7)(i), more information is needed regarding the role of Paul Gelman and the "extra"

[8]Exhibits identified as "D.R.-__" are citations to the exhibits attached to the Debtor's Response to Advanta.

tasks described on lines 1111, 1112, and 1113 of the Settlement Statement, attached as Ex. 7 to the Debtor's Response.

The Debtor also argues that the Coastal/Advanta Loan violates TILA and HOEPA because the Section 32 Disclosure Statement (Ex. D.R.-3) fails to disclose the final balloon payment on the loan as required by 12 C.F.R. §226.32(c)(3).[9] Advanta, however, contends that the Debtor is relying on the incorrect Section 32 Disclosure Statement. Advanta argues that the correct Section 32 Disclosure Statement for the Coastal/Advanta Loan is attached to Ex. D.R.-19, which includes a disclosure of the final balloon payment. Therefore, an issue of material fact remains as to whether the Debtor received a proper Section 32 Disclosure Statement prior to the closing on the Coastal/Advanta Loan. Neither Advanta nor the Debtor is entitled to summary judgment on Count I because of the outstanding issues of material fact that must be resolved at trial.

Count II - Alleged HIFA and Usury violations.

Advanta also moves for summary judgment on Count II arguing that the Debtor cannot prove that the loan is subject to HIFA because the Debtor has not provided any evidence that she entered in to a home improvement installment contract as part of the Coastal/Advanta Loan. The Debtor responds by arguing that (1) the HIFA issues were already resolved by this Court in the August 24, 2001 Memorandum Opinion, and (2) certain documents refer to a home

[9]The Debtor asserts that the Loan is subject to HOEPA under 15 U.S.C. §1602(aa)(1)(B) because it is a mortgage loan in which the total points and fees charged, in addition to interest, exceed 8% of the loan amount. Advanta has not admitted that the loan is subject to HOEPA, although the loan documents and the letter from its counsel tend to support the Debtor's position. (*See* Ex. D.R.-8 and Ex. D.R-19) The creditor of a mortgage that is subject to HOEPA is required to provide additional disclosures to the borrower "not less than 3 business days prior to consummation of the transaction." 15 U.S.C. § 1639(b)(1). The HOEPA early disclosure form is also known as a "Section 32 Form" because its requirements are located in section 32 of Regulation Z, 12 C.F.R. Part 226 (1979).

improvement installment contract or reference payment to Tabor Home Services (the alleged contractor), thereby showing the existence of the home improvement installment contract.

The Debtor is incorrect that the HIFA issues were resolved by the August 24, 2001 Memorandum Opinion. That Memorandum Opinion addressed the issues raised in Fairbanks' Motion for judgment on the pleadings and considered whether the Debtor had alleged sufficient facts to support claim under HIFA in connection with the second loan transaction which occurred on or about January 7, 1999 between the Debtor and Sterling, that was later assigned to Fairbanks (the "Sterling/Fairbanks Loan). That decision did not address whether the complaint adequately alleged a HIFA claim in connection with the Coastal/Advanta Loan.

To support her claim under HIFA, the Debtor must show that the Coastal/Advanta Loan was entered into to fund a home improvement installment contract. HIFA defines a "home improvement installment contract" as follows:

> **"Home improvement installment contract"** or **"contract"** means an agreement covering a home improvement installment sale, whether contained in one or more documents, together with any accompanying promissory note or other evidence of indebtedness, to be performed in this Commonwealth pursuant to which the buyer promises to pay in installments all or any part of the time sale price or prices of goods and services, or services.

73 P.S. §500-102(10). The statute's definition also sets forth certain exceptions, including one providing that a home improvement installment contract does not includes loans that are obtained directly by the borrower. *Id.*

In her complaint, the Debtor alleges that she was solicited by a contractor who offered to provide home improvement work and who put her in touch with the mortgage broker, James Siesser of Alpha One Mortgage. She further alleged that the Coastal/Advanta Loan resulted from these contacts. However, Advanta argues that these allegations are not supported by the

Debtor's deposition testimony, in which she stated that she had no recollection of entering into a home improvement installment contract.

While her deposition testimony is disjointed, it reveals that the Debtor's home needed repairs (Dep.Tr. at 22-23)[10], that she spoke to Brian Barber (who, apparently, is not related to the Debtor), the alleged contractor, about the need for repairs (Dep.Tr. at 24-25), that she did not have the money to repair her home (Dep.Tr. at 22), that Brian Barber contacted James Seisser, who came out to her property on a few occasions but had little, if any, direct conversation with the Debtor (Dep. Tr. at 37 - 39), and that Brian Barber asked her to sign papers for him so he could get some money and have someone repair her property (Dep.Tr. at 41-42). However, the Debtor also testified that she didn't remember taking out a loan or mortgage on her home (Dep.Tr. at 36, 46), and she denied having signed documents related to the Coastal/Advanta Loan that were shown to her at the deposition, specifically, the Section 32 Mortgage Loan Disclosure (Dep.Tr. at 43-44) and the Federal Truth-in-Lending Disclosure Statement (Dep.Tr. at 45-46).

In her response to Advanta's summary judgment motion, the Debtor alleges that the documentation evidences the existence of a home improvement installment contract, citing to the references to Tabor Home Services in the "Coastal Federal Mortgage Company Conditional Approval" (Ex. D.R.-2)(the "Loan Approval") and the Settlement Statement (Ex. D.R.-7). The words "need new contract from Tabor" are handwritten on the first page of the Loan Approval, and "Tabor Home Services - TBD 9000" is written on the second page of the Loan Approval in the section entitled "creditors to be paid off through closing process." The attachment to the

[10]Citations are to the transcript of the deposition of Margaret Barber taken on May 23, 2002.

Settlement Statement entitled "Breakdown for HUD Line 105" shows that $9,000 was paid to "Tabor and Margaret Barber."

The documentation presented by the Debtor and the Debtor's deposition testimony contradict Advanta's assertion that there is no evidence of a home improvement installment contract. In considering Advanta's motion for summary judgment, the Court's role is not to weigh the evidence, but to determine "whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Considering the facts in the light most favorable to the non-moving party, I conclude that an issue of material fact exists as to whether the payments earmarked for Brian Barber and Tabor Home Services for home repair services were being made pursuant to an agreement that meets the definition of a "home improvement installment contract" in 73 P.S. §500-102(10). Advanta's request for summary judgment on Count II will be denied.

Count III - Alleged UDAP violations.

In Count III of her complaint, the Debtor alleges that the conduct of all of the defendants falls within UDAP's definition of "unfair or deceptive acts or practices" set forth in 73 P.S. §201-2(4)(v) (by representing that the services have benefits they do not have) and §201-2 (4)(xxi)(by engaging in fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding).[11] As Coastal's assignee of a loan that is alleged to be subject to HOEPA, Advanta is subject to potential liability under 15 U.S.C. §1641(d). *See Barber,* 266 B.R. at 320.

[11]This statute is frequently referred to as "UDAP" since it regulates "unfair and deceptive acts and practices." *See* 73 P.S. §201-2(4); *In re Murray,* 239 B.R. 728, 729 (Bankr. E.D.Pa. 1999).

Advanta moves for summary judgment on Count III based upon the Debtor's deposition testimony, alleging that her inability to recollect events surrounding the Coastal/Advanta loan closing and her denial of signing the loan documents prevent her from offering any credible testimony regarding her receipt of required disclosures or as to misrepresentations that induced her to enter into the loan transactions. However, as discussed above under Count I, the Debtor properly submitted loan documentation to rebut Advanta's motion for summary judgment, which raises issues of material fact as to whether certain fees were unreasonable and whether certain disclosures were adequate. Also, as discussed above under Count II, there is an issue of material fact as to whether the Coastal/Advanta loan is subject to HIFA. If so, the Debtor argues that illegal fees and charges imposed in the Coastal/Advanta Loan created a *per se* violation of UDAP. *See In re Fricker*, 115 B.R. 809, 820 (Bankr.E.D.Pa. 1990) and *Russell v. Fidelity Consumer Discount Co. (In re Russell),* 72 B.R. 855, 871 (Bankr.E.D.Pa. 1987).

Finally, also as discussed under Count II, although the Debtor's deposition testimony was confused, it provides sufficient evidence to rebut Advanta's motion for summary judgment because, if viewed in the light most favorable to the Debtor as the non-movant, the deposition testimony, together with the documentation, tends to show that there is an issue of material fact as to whether the conduct of the defendants confused or misled the Debtor so that she was not even aware that she was entering into a loan transaction.

Because the Debtor has shown that there are issues of material fact with respect to Count III, I will deny Advanta's request for summary judgment on this Count.

Count IV - Alleged ECOA violations.

In Count IV of the complaint, the Debtor alleged that the "predecessor in interest" for both loan transactions violated 15 U.S.C. §1691(d) of ECOA by failing to advise the Debtor of the reasons for its refusal to extend credit on the terms requested by the Debtor in her loan application. Advanta seeks summary judgment in its favor on this Count arguing that it cannot be held liable for ECOA violations as an assignee of Coastal.

The Debtor responds that Ex. D.R.-11 provides evidence that the Coastal/Advanta Loan was assigned to Advanta on the same day the loan closing took place. Therefore, the Debtor argues, it can be inferred that Advanta participated in any decision made with respect to the Debtor's loan application.

I have already held that ECOA specifically eliminates an assignee's liability for ECOA violations unless the assignee participated in the violation or knew or had reasonable notice of the act that constituted the violation. *Barber,* 266 B.R. at 321. The Debtor's complaint does not allege that Advanta participated or knew of the ECOA violation. The Debtor's memorandum of law in response to a summary judgment motion cannot amend the Debtor's complaint. *Zimmerman v. Pepsico, Inc.,* 836 F.2d 173, 181 (3d Cir. 1988); *Private Capital Partners, Inc. v. RVI Guaranty Co., Inc. (In re Private Capital Partners, Inc.)*, 139 B.R. 120, 125 (Bankr. S.D.N.Y. 1992). Furthermore, even taken in the light most favorable to the Debtor, the fact - - standing alone - - that the assignment was made on the date of the loan closing is insufficient to support an inference that Advanta participated in any decisions regarding the Debtor's loan application, which was submitted a month prior to the closing.

Accordingly, Advanta's request for summary judgment in its favor on Count IV will be granted.

II. Fairbanks' Motion for Summary Judgment.

Count I - Alleged TILA/HOEPA Violations.

Fairbanks moves for summary judgment on the Debtor's TILA and HOEPA claims, arguing that the loan transaction that closed on or about January 7, 1999 (the "Sterling/Fairbanks Loan") does not meet the HOEPA requirements set forth in 15 U.S.C. §1602(aa). In particular, Fairbanks argues that the Sterling/Fairbanks Loan is not a high cost loan in which the "points and fees" payable by the borrower exceed 8% of the total loan amount. *See* 15 U.S.C. §1602(aa)(1)(B). Pursuant to Fairbanks' "points and fees" calculation, the Sterling/Fairbanks Loan misses the HOEPA threshold by $57.40.[12] In response, the Debtor argues that additional items paid at closing, not included in Fairbanks' calculation, were not bona fide or reasonable and, pursuant to 12 C.F.R. §226.32(b)(1)(iii), and need to be included in the points and fees calculation.

The term "points and fees," as used in 15 U.S.C. §1602(aa) for calculating whether a loan is subject to HOEPA, is defined in Regulation Z, 12 C.F.R. §226.32(b)(1), which provides that:

> (1) [P]oints and fees mean:
> (i) All items required to be disclosed under §226.4(a) and §226.4(b)[the finance charge], except interest or the time-price differential;
> (ii) All compensation paid to mortgage brokers; and
> (iii) All items listed in §226.4(c)(7) (other than amounts held for future payment of taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor.

12 C.F.R. §226.32(b)(1). The items listed in §226.4(c)(7) are real estate related fees that are normally excluded from the finance charge calculation under TILA. *See* 15 U.S.C. §1635(e) and

[12]Fairbanks' Motion for Summary Judgment, at 9.

12 C.F.R. §226.4(c)(7). However, these real estate related fees are not excluded for the purpose of calculating points and fees to determine if a loan meets the HOEPA threshold. The Debtor argues that the appraisal fee of $350, the flood certification fee of $16.75, the attorney fee of $395, the recording fees of $37.00, and title insurance fees in the aggregate amount of $442.00 (the "Disputed Fees") are unreasonable for a number of reasons.[13]

First, the Debtor argues that the Disputed Fees violate HIFA and, therefore, are unreasonable. As discussed below, there are remaining issues of fact as to whether the Sterling/Fairbanks Loan is subject to HIFA.

Second, the Debtor also argues that the title insurance fees and the attorney fees are unreasonable because they do comply with the requirements of the Insurance Manual. In particular, the Debtor argues that §5.6 of the Insurance Manual applies because the Sterling/Fairbanks Loan was a "refinance or substitution loan" made within 3 years of closing of Coastal/Advanta Loan for the same premises and there was no change in fee ownership of the premises. Therefore, the Debtor argues that the title insurance fee should have been limited to 80% of the reissue rate. Because the Debtor was charged the reissue rate of $377.10, the Debtor

[13]The Debtor's counsel argues that the Disputed Fees are presumed to be part of the points and fees calculation, unless Fairbanks can prove that the fees are reasonable, and that neither the lender nor any affiliate of the lender received compensation from the fees. Fairbanks argues that the Debtor has the burden of proving that the Disputed Fees should be included as points and fees because they are unreasonable or compensated the lender, citing to caselaw which discusses whether similar fees should be included as part of the "finance charge" for TILA disclosure purposes. The Debtor notes that the language regarding real estate related fees differs in 12 C.F.R. §226.4(c)(7) and 12 C.F.R. §226.32(b)(1)(iii), in that the language in §226.4(c)(7) specifically *excludes* such fees from the definition of "finance charge," while the language of §226.32(b)(1)(iii) specifically *includes* such fees in the HOEPA calculation. This flip in the language may signal a shift as to which party bears the burden of proving whether the Disputed Fees should be "excluded" or "included" in calculating HOEPA points and fees. Because I do not reach this issue on the merits, I am not deciding which party has the burden of proof with respect to each.

argues that she overpaid by $75.42, which makes the title insurance fee unreasonable and brings the Sterling/Fairbanks loan within the HOEPA threshold.

Fairbanks argues that the Court should not properly consider the Insurance Manual in deciding the summary judgment motion, but, as discussed *infra* in connection with the Debtor's Response to Advanta, I have taken judicial notice of the Insurance Manual. However, the Insurance Manual alone cannot resolve the cross-motions for summary judgment by Fairbanks and the Debtor on Count I. First, Fairbanks correctly points out that Ex. D.R.-24 states on its cover page that it is effective from October 1, 1999 through October 1, 2000. Since the Sterling/Fairbanks Loan closed in January 1999, there is an issue of whether the fees in the Insurance Manual changed. Second, §5.6 of the Insurance Manual states that it does not apply to the "Approved Attorney Procedure," and the fees charged by Paul Gelman, Esquire at the closing raise an issue of fact as to whether the applicable title fees for the Sterling/Fairbanks Loan should be determined in accordance with §5.18 (although it does not appear that the title insurance fees of $377.10 bear any resemblance to the fee scale of §5.18). Finally, without more evidence as to how the title insurance fee was calculated, there is no way of knowing whether additional fees could have been charged pursuant to §2.1, §2.3 or §2.4 of the Insurance Manual. These remaining factual issues prevent summary judgment on the issue of whether the Sterling/Fairbanks Loan is a HOEPA loan.

Regardless of whether the Sterling/Fairbanks Loan is subject to HOEPA, the Debtor similarly argues that the title insurance fees and the attorney fees should have been disclosed as finance charges pursuant to 15 U.S.C. §1605 and 12 C.F.R. §226.4(c)(7)(i) because the fees are not bona fide or reasonable. The Debtor argues that failure to disclose the fees as finance

charges violated TILA. Due to the factual issues surrounding the fees as discussed above, summary judgment cannot be granted in favor of either Fairbanks or the Debtor on the TILA issues.

For the reasons set forth herein, the cross-motions for summary judgment as to Count I will be denied.

Count II - Alleged HIFA Violations.

Fairbanks argues that it is entitled to summary judgment on Count II because the Debtor's deposition testimony failed to provide any support for the allegations in her complaint that the Fairbanks/Sterling Loan is subject to HIFA. Fairbanks pointed out at that, at the deposition, the Debtor denied signing the Sterling/Fairbanks Loan documentation or any contract to have home improvement work done on her house. Fairbanks argued that the Debtor also failed to provide any testimony that the Sterling/Fairbanks loan was initiated by a contractor or was to remedy home improvements financed by the Coastal/Advanta loan.

The Debtor argued that this Court already resolved "most of the issues" of whether the Sterling/Fairbanks Loan is subject to HIFA in the August 24, 2001 Memorandum Opinion. However, Fairbanks is correct is asserting that the August 24, 2001 decision only determined that the Debtor had alleged sufficient facts to defeat Fairbanks' previous motion for judgment on pleadings with respect to whether HIFA applied to this loan transaction. To defeat Fairbanks' summary judgment motion, the Debtor must provide more than allegations; she must provide some evidence of specific facts and show that there is a genuine issue for trial. Fed.R.Civ.P. 56(e).

In the Debtor's Response to Fairbanks, the Debtor attached various exhibits to support her claim that the Sterling/Fairbanks Loan is subject to HIFA.[14] The Debtor provided a copy of a contract dated January 4, 1999 for home improvement services between the Debtor and Tabor Home Services in the amount of $4,206.83. *See* Ex. D.R.-14. The Debtor also noted that the breakdown for line 105 of the HUD-1 Settlement Statement for the Sterling/Fairbanks Loan showed a disbursement made jointly to the Debtor and "Home Improvement Services" in the amount of $4,206.83. *See* Ex. D.R.-16.

Finally, as also discussed in connection with the Coastal/Advanta Loan, the Debtor's deposition testimony, while confusing, did establish that the Debtor's home needed repairs (Dep.Tr. at 22-23), that she spoke to Brian Barber, (who, apparently, is not related to the Debtor), the alleged contractor, about the need for repairs (Dep.Tr. at 24-25), that she did not have the money to repair her home (Dep.Tr. at 22), that Brian Barber contacted James Seisser, who came out to her property on a few occasions but had little, if any, direct conversation with the Debtor (Dep. Tr. at 37 - 39), and that Brian Barber asked her to sign papers for him so he could get some money and have someone repair her property (Dep.Tr. at 41-42). The undisputed documentation for the Sterling/Fairbanks Loan clearly shows that Seisser was the broker for the transaction and the Debtor's deposition underscores that she did not originally select Seisser or make arrangements for the loans. Both the documentation and the Debtor's

[14]The Debtor referred to the same documents in responding to both Advanta's and Fairbanks' motions for summary judgment. Like Advanta, Fairbanks argues that the exhibits attached to the Debtor's Response (the "Debtor's Response to Fairbanks") cannot be considered because the affidavit of the Debtor's counsel could not authenticate the documents. For the reasons set forth *infra*, all of the documents except Ex. D.R.-9 and Ex. D.R.-10 are properly before this Court for purposes of the summary judgment motions and the debtor's responses thereto.

testimony are sufficient to establish that a genuine issue of material fact exists as to whether the Sterling/Fairbanks Loan is subject to HIFA.

Fairbanks also argued that it was entitled to summary judgment on the Debtor's usury claims asserted in Count II of the complaint. In support of this position, Fairbanks attached an affidavit of Tammy M. Cramer to its summary judgment motion, in which Ms. Cramer states that the Debtor has never made a principal or interest payment on the Sterling/Fairbanks Loan to Fairbanks. Fairbanks argues that the Debtor's failure to pay any interest prevents her from asserting a usury claim under 41 P.S. §502, which provides in pertinent part:

> A person who has paid a rate of interest for the loan or use of money at a rate in excess of that provided for by this act or otherwise by law or has paid charges prohibited or in excess of those allowed by this act or otherwise by law may recover triple the amount of such excess interest or charges in a suit at law against the person who has collected such excess interest or charges.

The Debtor, however, alleges that she can assert a usury claim defensively to reduce or recoup the usurious rates which Fairbanks has attempted to collect by filing a proof of claim in this case. However, upon review of the language of 41 P.S. §502, the Court in *Waye v. First Citizen's Nat'l Bank,* 846 F.Supp. 310 (M.D.Pa. 1994) decided that "[a] cause of action against the lender demanding a rate in excess of the statutory maximum exists only if the interest was actually paid, not merely demanded without success." *Waye,* 846 F.Supp. at 319. Both the plain language of the statute and the decision in *Waye* provide that a cause of action can only be maintained to recover usurious payments. Since the Debtor has not actually made any payment on the Sterling/Fairbanks Loan, the Debtor's usury claim under Count II must fail.

Accordingly, Fairbanks' request for summary judgment on Count II will be denied as to the Debtor's HIFA claims, but granted as to the Debtor's usury claims.

Fairbanks' Motion for default judgment against the Debtor on its counterclaims.

On November 26, 2001, Fairbanks filed an Amended Answer and Counterclaim to the Debtor's complaint. In its motion for summary judgment, Fairbanks requested entry of a default judgment against the Debtor under Fed.R.Bankr.P. 7055 for failure to answer Fairbanks' counterclaims. The Debtor argued against default judgment in the Debtor's Response to Fairbanks, and eventually filed an answer to Fairbanks' counterclaims on July 31, 2002.

"Default judgments, however, are greatly disfavored by the courts 'and in a close case, doubts should be resolved in favor of setting aside the default and reaching the merits." *Kaufffman v. Cal Spas,* 37 F.Supp.2d 402, 404 (E.D.Pa. 1999) *quoting Zawadski De Bueno v. Bueno Castro,* 822 F.2d 416, 420 (3d Cir. 1987). Another court has noted that it would be reluctant to grant a default judgment when a plaintiff eventually, although untimely, filed a response to the counterclaim. *Horizon Plastics, Inc. v. Constance,* 2000 WL 1176543, *3 n.4 (D.N.J. August 11, 2000).

Because Fairbanks' counterclaims are based upon documents allegedly signed by the Debtor at the Sterling/Fairbanks Loan closing, there will be no prejudice to Fairbanks if its request for default judgment is denied. The Debtor has not simply denied the allegations in the counterclaims, but has asserted defenses, including its argument that the indemnification and hold harmless agreements violate the policies underlying HIFA. Finally, nothing in the record suggests that the Debtor's failure to file a timely complaint was due to bad faith or wilfulness. *See Zawadski*, 822 F.2d 420-21. Accordingly, Fairbanks' request for default judgment on its counterclaims will be denied. A trial date will be set and the parties will proceed to try the remaining claims and the counterclaims on the merits.

An order consistent with this Memorandum follows.

BY THE COURT:

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

Dated: June 3, 2003

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	CHAPTER 13
MARGARET BARBER,	:	
	:	Bankruptcy No. 00-10027 KJC
Debtor.	:	
MARGARET BARBER,	:	
Plaintiff	:	
v.	:	
FAIRBANKS CAPITAL CORP.	:	
ALPHA ONE MORTGAGE CORP.	:	
JAMES SIESSER and	:	
ADVANTA MORTGAGE CORP.	:	
Defendants	:	ADVERSARY NO. 00-696

ORDER

AND NOW, this 3rd day of June, 2003, upon consideration of Advanta Mortgage Corporation's motion for summary judgment, Fairbanks Capital Corporation's motion for summary judgment, the Debtor's responses to the motions for summary judgment and request for summary judgment on Count I, and other pleadings and memoranda filed in support thereof,

AND, for the reasons given in the accompanying Memorandum, it is hereby **ORDERED** and **DECREED** as follows:

1. Advanta Mortgage Corporation's motion for summary judgment is hereby granted as to Count IV, and denied as to Counts I, II, and III;

2. Fairbanks' Capital Corporation's motion for summary judgment is hereby granted as to the Debtor's usury claims under 41 P.S. §§ 502 and 503 set forth in Count II, and denied as to Count I, and denied as to the Debtor's claims under the Home Improvement Finance Act, 73 P.S. §500-101 *et seq.*, set forth in Count II;

3. Fairbanks' Capital Corporation's request for default judgment on its counterclaims is denied; and

4. The Debtor's motion for summary judgment on Count I against Advanta Mortgage Corporation and Fairbanks Capital Corporation is denied.

BY THE COURT:

_____

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

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